No. 2360

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE BEATSON COPPER COMPANY,
a Corporation,

Plaintiff in Error

vs.

JOHN PEDRIN,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR

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Statement of the Case.

In this brief the parties will be referred to as in the trial court, defendant in error as plaintiff, and plaintiff in error as defendant.

The statement of the case in defendant's brief is so inaccurate as to be misleading, and plaintiff presents the following as absolutely accurate in every detail mentioned:

Plaintiff sued to recover damages for personal injuries received by him while working in a mine owned

and operated by defendant. When injured he was working on the night shift in a pit or "glory hole," his task being that of "bulldozing," or breaking large rocks with powder at the bottom of the glory hole. At the same time drillers were drilling and loading holes with dynamite for the purpose of breaking down ore. While most of them on shift, including plaintiff, were at lunch about midnight the dynamite charges in the wall were fired. Colloquially this is known as firing shots.

After lunch plaintiff and John Schmitt, another "mucker," who had been working with him, returned to the ground adjoining the glory hole and were immediately ordered by Green, the shift boss, to go down quickly into the hole and bulldoze the large rocks broken down by the shot. Testimony was offered showing that Schmitt wanted to examine the walls to ascertain their condition, as is usual after firing a shot, but the foreman said the wall was solid and he wanted the men to hurry and get some ore ready to load cars. Plaintiff was sent to the powder house for powder, although that was a duty for which a man, known as the "powder monkey," was employed, and when he returned with the powder he and Schmitt went to work at the bottom of the glory hole, plaintiff placing the dynamite for bulldozing and Schmitt holding a small lantern, the only light they had to work by. (R. 104-5-6.) Soon afterward, while plaintiff was on his knees

at work, a slide of rock and earth came down from the wall, almost burying him and causing the injuries complained of.

Plaintiff pleaded that he was without fault; that he had exercised all the care that could be expected of him; that it was the duty of the company to assure the safety of the glory hole so far as reasonable precautions could do so; that this was the duty of the foreman in charge of the work; that it is a rule of safe mining everywhere that the foreman in charge shall examine the wall after a "shot" has been fired in it and have all loosened fragments detached before proceeding with other work in the place; that in this case the foreman failed and neglected to do this, a fact of which plaintiff had no knowledge and no means of knowledge in the ordinary course of his employment; that the accident was wholly due to this negligence of the employer.

The defendant answered, denying any negligence on its own part and pleading assumption of risk and negligence of "plaintiff himself, and or by the negligence of a fellow servant." At the trial defendant offered no evidence except that of its surgeon as to plaintiff's injuries and their consequences.

Defendant's statement of the case is inaccurate in the following particulars: Plaintiff did not begin work on November 12, 1912, and work in the glory hole through November, December and January fol-

lowing. He began work about December 1, worked irregularly around the mine proper and its environs. He had been working steadily only two weeks when injured, on January 25, 1913. His work is thus described by himself and not contradicted:

"I was mucking and shoveling the snow—shoveling the cars and cleaning the track and bridge there. I worked sometimes in that glory hole,—any place they put me to work." (R. 23.)

Similar statements were made by plaintiff on cross-examination. (R. 40-41.)

No evidence was offered to show, as stated in defendant's brief, that "It was the duty of plaintiff, his shift-boss and Schmitt, to pry away loose and overhanging rock." The uncontradicted testimony of plaintiff's witnesses was that the duty of insuring the safety of the walls as far as possible was incumbent upon the company's agent in charge of the work. Defendant offered no testimony on this point.

Defendant's brief is inaccurate in stating that on the night of the accident "Pedrin, Schmitt and Green, the shift-boss, together with a couple of drillers, were working enlarging this glory hole and taking away the rock." Green was not working there except to give occasional orders from outside the glory hole. He was in charge of all the operations on the shift, which included work in other parts of the mine and outside of it.

Defendant's statement is inaccurate in averring that

before going into the glory hole Schmitt made some inspection and discovered an unsafe condition. Schmitt testified that when he returned to work after lunch he took a pinch bar and started to examine the wall where the shot was fired and was stopped by Green, who assured him the wall was solid. (R. 91-92-103-4-5-6.)

The jury returned a verdict for plaintiff, upon which judgment was entered, and defendant sued out a writ of error, assigning thirty-four errors. The first two are abandoned in the brief. In argument counsel for defendant set up and urge seven contentions.

First. Defendant in its answer to plaintiff's complaint pleaded affirmatively assumption of risk, contributory negligence and negligence of a fellow-servant. No reply was filed and it is argued that defendant was entitled to judgment on the pleadings. Carter's Alaska Code is cited:

"Sec. 901. If the answer contain a statement of new matter, constituting a defense or counter-claim, and the plaintiff fail to reply or demur thereto, the defendant may move the court for such judgment as he is entitled to on the pleadings," etc.

The answer to this contention is simple. Defendant did not set up any new matter. Part of its answer was labeled "affirmative defense," but this affirmative defense only contained allegations which amounted to denials of averments of the complaint. Plaintiff in Paragraph IV of his complaint explicitly averred that

it was the duty of the defendant corporation, through its representative in charge of the work, to provide a reasonably safe place to work; that this duty was wilfully neglected, and the neglect was the direct and proximate cause of plaintiff's injuries. These allegations negative the pleas of assumption of risk and negligence of a fellow-servant. In the same paragraph plaintiff avers that he did not know and had no means of knowing in the ordinary course of his employment that the wall had become unsafe. This negatives the defense of contributory negligence. By direct and distinct averments plaintiff had anticipated all possible defenses and a reply negativing these defenses a second time would have been a mere repetition. The issues were already clearly defined and no new one was raised by the answer. Perusal of Paragraph IV of the complaint disposes of defendant's contention. It is as follows:

"Plaintiff alleges that while working on the shift in said mine as hereinbefore recited he was under the immediate direction and orders of one Green, whose first name is to plaintiff unknown, who was then and there shift boss or foreman of said work and vice-principal of defendant corporation, and it was the duty of said foreman acting for defendant corporation to provide a reasonably safe place to work for the men under his direction by taking all reasonable precautions for their protection, and in discharge of such duty it was incumbent upon him to see and provide that after a shot was fired in the wall of said glory hole no loosened fragments were allowed to remain upon the wall from which they might without warning become detached. Plaintiff alleges that said foreman and vice-principal wilfully and negligently and

recklessly failed to discharge said duty in this instance, and that his said wrongful neglect was the direct and proximate cause of plaintiff's said injuries. Plaintiff alleges that when he went to work on the night shift as aforesaid the said glory hole was very dark and it was necessary to perform his said work of bulldozing by the light of a lantern which was held for him by another man; that he had no knowledge of the unsafe condition of said wall and no means of knowledge in the ordinary course of his employment; that when he returned to work in said glory hole after dinner at about 12:30 A. M. as aforesaid he had no knowledge of the fact that the wall above his place of work was in a dangerous condition, and had no means in the ordinary course of his employment of acquiring knowledge of that fact; that he was ordered by said foreman to resume immediately his work of bulldozing at the bottom of the glory hole and was so engaged and was working by the light of a lantern held by a co-employee, named John Schmitt, and commonly called 'Russian John,' when the mass of rock and earth fell upon him from said wall as hereinbefore described."

In paragraph II of the complaint plaintiff alleges:

"It is a rule absolutely required by safe mining, and usually followed at defendant's mine, after a 'shot' is fired to make a careful examination of adjacent walls from which fragments might fall upon men working near, and to 'bar down' or pry loose with crowbars all loosened portions of the wall. These precautions for insuring a safe place for miners and laborers to work are recognized rules of careful and safe mining and constitute a duty devolving upon the mine operator and his vice-principal, the foreman or the shift boss directing the work."

Counsel for defendant cite several cases in support of their contention. Examination of these cases shows that in most of them the answer did contain new matter, calling for evidence that could not have been intro-

duced under a general denial. In Benecia etc. v. Creighton, 30 P. 676, the defendant, sued on a note, pleaded partial want of consideration and settlement in full, reciting the terms of the alleged settlement. In Haines v. Connell, 87 P. 265, plaintiff sued to quiet title against a sheriff's deed founded on an attachment proceeding. Defendants pleaded facts showing a purchase in good faith before plaintiff's deed was filed for record. In Babcock v. Bank, 26 P. 1037, defendant was sued on a note and pleaded that he had paid enough usurious interest to extinguish the note. In Minard v. McBee, 29 Or. 225, 44 P. 491, plaintiff sued on a note and admitted several payments. Defendant answered, alleging payments not credited. Clearly, this was new matter, introducing a new issue. In Thomson v. Allen, 1 Alaska 636, plaintiff sued to quiet title and defendant set up in her answer a superior title, founded on a location of a mining claim, alleging all the facts concerning the location, clearly an affirmative defense.

None of the cases cited is similar to the one at bar except L. & N. R. Co. v. Paynter (Ky.) 82 S. W. 412 Two justices dissented from the decision and it is at variance with the weight of authority. Outside of Kentucky hardly anything supporting it can be found Some of the cases cited do not touch the contention. For example, the Hathaway case in 99 Fed.

The real test of new matter in an answer is, does

it introduce an issue wholly new? If the issues are fairly made up by a liberal construction of the complaint and answer no issue can be added by a reply. The whole office of pleadings is to make up issues. Carter's Alaska Code provides:

"Sec. 75. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties."

In Bowles v. Doble, 11 Or. 480, the court said:

"A motion for judgment on the pleadings is not in harmony with the spirit of the Code, and as a consequence such a motion ought not to be favored."

In Currie v. S. P. Co., 23 Or. 400, the foregoing exposition of the law is quoted and approved.

An Oregon case in the federal court, Watkinds v. S. P. Co., 38 Fed. 711, construing the code provision in question, is decisive because on the identical point. The court said:

"The answer also contains a statement erroneously styled "a further and separate defense," in which it is alleged that the defendant used due care and diligence in the matter complained of, and that the alleged injury to the plaintiff was not caused by any negligence on the part of the defendant, but was wholly owing to the negligence and fault of the plaintiff himself."

"No reply having been filed to this so-called 'defense,' the defendant moves the court for 'judgment against the plaintiff on the pleadings, and for want of a reply.'

* * * * * * * *

"The statute in authorizing a judgment on the plead-

ings in case no reply is made to a defense, presupposes that the facts constituting such defense are not elsewhere stated or put in issue in the pleadings; in short, that they are 'new matter.'

"Admitting, then, for the sake of argument, that the defense of contributory negligence is well pleaded, and uncontroverted by a reply, still the same matter is put at issue by an allegation of the complaint, and a denial of the answer.

"The court cannot give judgment for the defendant on the pleadings, unless, when taken as a whole, the fact or facts necessary to the support of such a judgment are thereby admitted.

"True the defendant contends that the fact of contributory negligence, as alleged in this defense, is admitted, because no reply has been filed thereto. But the plaintiff had already alleged that he was not guilty of contributory negligence, and the defendant, by denying the same, took issue with him thereon. An issue having been reached on this question between an allegation of the complaint and a denial of the answer, there is no necessity for any further pleading thereabout.

"I know it may be said that this allegation, not being necessary to the statement of plaintiff's case, is immaterial, and the issue taken upon it is so likewise. But it anticipates and controverts a possible defense to the action; and the defendant having accepted the controversy in this form by taking issue on the allegation, I do not think it can be heard to say the issue is an immaterial one, and ought on this motion to be disregarded.

"But this defense is not a good plea of contributory negligence, and is nothing more than another 'denial' of the plaintiff's allegation that the injury was not caused by any fault or negligence on his part."

This cogent statement covers every phase of defendant's alleged "affirmative defenses" in this case. These defenses are so stated as to constitute merely cumula-

tive denials of the allegations of the complaint, all of which allegations touching the facts and circumstances of plaintiff's injury had already been denied by the answer. The plea of assumption of risk "incident to the employment," as it is stated, is nothing more than a denial that defendant was at fault. Under the Oregon rule it is unnecessary for a defendant to plead assumption of ordinary risks by an employe, because the law imposes that liability upon him. Hence such a plea is immaterial.

"The answer need not allege that he assumed the risk that caused his injury, if the hazard was ordinary." Tucker v. N. P. R. Co., 41 Or. 42, 68 P. 426.

The plea that plaintiff was injured through the negligence of a fellow-servant can be taken as nothing more than a denial of the allegation that Foreman Green was in charge of the work and was a vice-principal, charged with a non-delegable duty, since if it was intended to plead the negligence of any other employe the facts should have been distinctly alleged so that plaintiff could meet them. If this was not done there was no affirmative defense. Finally, if contributory negligence was intended to be pleaded the facts constituting the negligence should have been set out. Bailey on Personal Injuries, Vol. III, Sec. 853.

If it be contended that the statement of these "affirmative defenses" should have been demurred to for insufficiency the answer is found in the provision of

sec. 62 of Carter's Alaska Code of Civil Procedure, that the objection that a pleading does not state facts sufficient to make it a good cause of action or defense is never waived. It may be raised at any time. It was not necessary to take any notice of an answer which amounted to no more than a denial of plaintiff's cause of action, since issue was thereby joined on the complaint and called for trial.

"New matter constituting a defense must be complete in itself, and must contain all that is necessary to answer the whole cause of action, or that part of it to which it is addressed." Gardner v. McWilliams, 42 Or. 17.

"We cannot presume that, if the facts relied upon to sustain this plea had been stated, plaintiff would not have met them with rebutting testimony. It is the plaintiff's right to know the facts, and to have an opportunity to meet them." Johnson v. L. & N. R. Co., 16 So. 75.

Defendant's "affirmative defenses" stated no probative facts but only legal conclusions.

The issues were clearly made up by the pleadings, so that neither party could be misled, and if there were any defects in the pleadings they were cured by the verdict. The general rule is thus stated:

"Though there is a defect, imperfection, or omission in the pleadings, yet if the issue joined is such as necessarily required on trial proof of the fact so defectively or imperfectly stated or omitted, and without which it is not to be presumed that the jury would have rendered the verdict found, such defect, imperfection, or omission is, as it is expressed, cured by the ver-

dict." 22 Ency. of Pl. & Prac., 939, citing numerous cases.

Judge Moore in Hannon v. Greenfield, 36 Oregon 97; 58 Pac. Rep. 888-9, says:

"The rule is well settled in this state that a general verdict will cure a defective statement in a pleading, but will not aid one from which a material averment is omitted."

The other six contentions stated may be considered together because they all go to the issue of negligence in the case. These contentions are as follows:

"Second. The defendant was not charged with the duty of keeping the glory hole safe from dangers incident to the progress of the work since a master is not obliged to keep the place of work free from dangers incident to the progress of the work for which the employe is engaged.

"Third. Plaintiff and his fellow employes were charged with the duty of inspecting and keeping safe the glory hole in which they were working.

"Fourth. The shift boss was a fellow-servant of plaintiff and not a vice-principal of defendant.

"Fifth. The plaintiff was guilty of contributory negligence in that he failed to inspect the banks surrounding the glory hole, before he took up his work therein.

"Sixth. The assurance given by the shift boss that the banks were safe was simply the negligent act of a

fellow-servant for which defendant was not responsible.

"Seventh. The danger incident to the blasting and removal of the banks of the glory hole was one of the risks incident to his employment which was assumed by the plaintiff."

The second and third contentions together urge that plaintiff and his co-workers were charged with the duty of keeping the glory hole as safe as possible, because the master is not obliged to keep a place of work free from dangers incident to the progress of the work. The vice of this argument is that it assumes all dangers arising under any circumstances in the glory hole to have been "incident to the work." Plaintiff's claim is based upon the allegation that an unnecessary hazard was added by the employer's negligence and that this needless hazard was a breach of a non-delegable duty.

It is well to observe here that defendant offered no evidence in the trial except that of its surgeon as to the extent of the plaintiff's injuries. All evidence as to negligence, including testimony as to mining law and customs affecting the duty to keep the glory hole as safe as possible, was introduced by plaintiff, and defendant made no effort to break it down except by cross-examination of plaintiff's witnesses. Neither Mr. Green nor Superintendent Van Campen was produced as a witness. This raises a presumption against the defendant under an express provision of Carter's Alas-

ka Code, Sec. 673, sixth and seventh subdivisions:

"Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

Equally should the failure of a party to offer any testimony in support of positive denials and averments of its answer raise the presumption that it had none to offer. It cannot be seriously assumed that the skilful and experienced counsel who represented defendant in the trial held back witnesses who could have strengthened his case.

In a recent Wyoming case, Owl Creek Coal Co. v. Goleb, 210 Fed. 209, judgment for plaintiff was reversed solely because the trial judge refused to admit testimony offered by defendant to show almost precisely the facts pleaded by defendant herein. The case was so similar to the one at bar that argument in one almost fits the other. The negligence charged was that defendant "negligently permitted the place where plaintiff was working to become unsafe and dangerous," the fault being charged upon the pit boss, Kirby. Plaintiff was injured by the fall of coal upon him soon after "shooting" in the wall, having been ordered to work there by Kirby over his protest. The pleadings were almost identical on both sides with the plead-

ings herein. The appellate court held that defendant should have been allowed to show, as it offered to do, that plaintiff knew the conditions of the place, that the danger was obvious, that he had been warned of the danger, that he had made some test of the walls, that it was his duty to remove loose coal when the walls were plainly insecure. The trial court was sustained on all other points.

In the case at bar the chief issue was to locate the duty of inspecting the walls after a shot and removing loose fragments if found. Plaintiff introduced positive testimony placing that duty upon the employer. Defendant failed to offer any proof at all in contradiction.

It seems superfluous to argue the law governing the non-delegable duty of the employer to use reasonable care to make the place of work as safe as its nature and purposes permit. The rule is that he must eliminate needless hazards and if he fails to do this he is guilty of actionable negligence, whether the neglect is his own or that of an agent. See Labatt's Master and Servant, sec. 1483, 2d Ed.:

"The establishment of the above doctrine has undoubtedly been brought about by recognition of the fact that, unless the master's liabilty for the acts of a vice-principal were admitted, the rule that dangers caused by the master's negligence are not among those assumed by the servant would, in the great majority of cases, be rendered nugatory. The most satisfactory standpoint seems to be obtaned by considering it to be an application of the general principle of jurisprudence, that anyone upon whom a duty of an absolute

quality is imposed must, at his peril, see that it is discharged in a reasonably careful manner, whether he undertakes its performance in person, or employs a deputy for that purpose. That is to say, the care which a master is bound to use, he exercise through another only at his own risk. 1 Beven. Negl. pp. 493 et seq.; Shearm. & Redf. Neg. secs. 14, 176; National Steel Co. v. Lowe, 127 Fed. 311."

The defect of the argument advanced by counsel for defendant is that it fails to recognize the distinction between risks inseparable from the progress of the work and those added to it needlessly by the agent directing the work. The argument for the employer in all such cases is that if the work of the employe had any part in making the accident possible, or if he might by any possibility have ascertained and avoided the danger, he is to be held responsible for his own mischance. Decisions can be cited which uphold, or seem to uphold this contention, but the drift of recent judicial decisions, as well as legislation, has overthrown all such authorities. Nearly all the courts follow the modern rule, which is explicitly laid down by the supreme court in Kreigh v. Westinghouse, 214 U. S., 249-256, as follows:

"Nevertheless, the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. As late as Santa Fe & Pacific R. R. Co. v. Holmes, 202 U. S 438, it was declared: 'The duty is a continuing one and must be exercised whenever circumstances demand it.'

"Where workmen are engaged in a business, more

or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employes, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employe should be exposed to dangers unnecessary to the proper operation of the business of his employer. Choctaw, Oklahoma etc. R. R. v. McDade, 191 U. S. 64, 66 and cases there cited."

The rule is more tersely stated in Santa Fe Pacific Railroad Company v. Holmes, 202 U. S. 438, as follows:

"The duty of the master to furnish safe places for employes to work in and safe appliances to work with is a continuing one to be exercised wherever circumstances require it."

In this case it was the duty of the defendant, acting through whatever agent directed the work, to take reasonable precautions to keep the walls of the glory hole in such condition that they would not fall upon the men working in the pit. The contention that it was the duty of the men to inspect the wall for themselves under the circumstances is answered by Mr. Labatt, sec. 1013, in laying down among the continuous duties of the master the following:

"To refrain from giving orders which will require a servant to put himself in such a position that he will be subjected to the risk or injury from a defective instrumentality is a duty the breach of which is no less culpable than the breach of the analogous duty of abandoning the use of the defective instrumentality."

The evidence shows that Foreman Green hurried plaintiff and Schmitt into the glory hole without an inspection of the wall where a shot had just been fired. Schmitt testified that Green assured him the wall was solid and that there was no need of "barring down." Then plaintiff was sent after powder. (R. 92-105.) Green and Schmitt awaited his return. (R. 105.) He might naturally have assumed that in his absence Green had determined that the wall was safe. Another circumstance fixing responsibility upon the defendant, through its directing agent, to inspect the wall, and excusing plaintiff, is the darkness. It was a winter night and the men had only a small lantern to work by. (R. 28-76-77-110-1-2.)

The law governing liability in construction work, repair work or making a dangerous place safe is well settled. It is conceded that the ordinary hazards arising in any of those classes of work are assumed by the employe. It is as well settled that if the negligence of the employer adds an unnecessary risk he is liable for resulting injuries to the employe. In this, as in all similar cases, the question is solely the application of these conceded principles to the particular facts.

Counsel for defendant lift from the record into their brief considerable testimony of Pedrin, the plaintiff, and of "Russian John" Schmitt on the custom of barring down and what was done in this instance, but

cautiously omit the statements made by these two men concerning orders. On page 27 of the record Pedrin states:

"Q. Now, after they fire off a shot in that glory hole what do they usually do first?
"A. Well, they always give us orders what we have got to do, so that night he gave me orders to go and clear up that shaft and bulldoze that big rock that fell down."

Defendant's brief then gives the further testimony of Pedrin as to what "they" do. Clearly by "they" he means the authority giving orders and what the men do under those orders.

Defendant's brief stops quoting Pedrin's testimony when it comes to this:

"Q. When you came back, did anybody give you any orders?
"A. Yes, sir, Mr. Green gave me orders.
"Q. What did he tell you to do?
"A. He told me to go to that shaft 38, where there was a glory hole and bulldoze all them big rocks that fell down, that had been shot in there. (R. 27-8.)

Pedrin then told of Green's hurry--up order to get some ore ready for the chute leading to the cars. On page 512 his testimony states that when he returned from dinner, Green, who was standing at the side of the glory hole, told him first to resume bulldozing in the glory hole, then changed the order and sent him for powder first.

Defendant's brief, quoting freely from "Russian John's" testimony, overlooks this:

"Now when you went back to the glory hole after 12 o'clock did you get any orders? Yes.

"Q. From whom? A. Mr. Green.

"Q. What did he tell you to do?

"A. He told me, he say, 'John, leave alone that; I don't want to bar down; I want to draw from this chute.'

"Q. Do I understand that Mr. Green told you, you and John, to go and bulldoze those rocks at the bottom of the glory hole?

"A. Yes; he say, 'I want to bulldoze those rocks as quick as I can. John, go and get powder and bulldoze that rock,' and I said, 'No, I don't go after powder; I have no right powder-monkeying—the powder monkey gets his wages; I get mucker wages. I want to bar down before I go bulldozing.' He said." (R. 92.)

Defendant's brief then takes up the narrative as follows:

"'Nothing doing; this ground is solid.' I said 'By golly, I don't know; I have to try."

On page 106 Schmitt says:

"Green tells it was all right. He don't allow me to examine."

And on page 113, after repeating that Green stopped his examination of the wall, Schmitt says:

"Sure; he is the boss here or manager—I take the order you say and have to do by your order."

By skilful cross-examination counsel for defendant induced Pedrin and Schmitt to make various loose statements as to what miners usually do about barring down walls after a shot. By keeping away from the question of orders in this case and the testimony as

to its being the duty of the shift boss by rule everywhere to inspect the walls defendant's brief argues that the testimony shows the muckers to have been charged with that duty. Credit is due to counsel, however, for stating on page 65 of their brief the testimony of Gleason, who qualified as an expert miner of long experience. (R. 117.)

"Q. Where work is being done under the direction of a foreman or shift boss who looks after that?" (Referring to clearing walls after a shot.)
"A. Why, the foreman or shift boss who is in charge." (R. 119.)

The broken English of Pedrin and Schmitt and their frequent unresponsive answers to questions shows that they are illiterate men who did not fully understand many of the questions nor the exact purport of some of their own answers. While admitting freely that the miners or muckers do the work of barring down walls after a shot, they also said, whenever their attention was directed to the point, that the men do it under orders whenever they have a foreman. In this case they obeyed orders implicitly. The hurry-up orders of Green placed Pedrin in hazard of his life when five minutes' work or less would have removed the wholly needless risk, which Pedrin plainly did not comprehend, as there was ample time for Green to examine the walls while he was gone for powder. In any view of the case Green was culpable under the rule already cited from Labatt as to the duty

of the master to refrain from giving orders that place servants in peril.

That a wall of earth and rock nearly perpendicular is liable to cave, every person of slight intelligence knows. That it may stand for a long time is also well known. That a person of some experience with such walls can tell by a few minutes' examination whether there is imminent danger of its caving is equally true. Because of these incontestable facts failure of the agent representing the employer in this instance to ascertain the condition of the wall before sending men into the glory hole to work in the darkness was neglect of the non-delegable duty of the master to take reasonable precautions to make the place of work as safe as the nature of the work permitted. It was a duty so simple that neglect of it was gross negligence. Whether plaintiff was also negligent was a question of fact for the jury.

"If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work." Grand Trunk R. R. Co. v. Cummings, 106 U. S. 700; Deserant v. Cerillos Coal Railroad Co., 178 U. S., 409, 420, and cases there cited.

The whole current of recent judicial decisions destroys the authority of the cases cited by defendant. Particularly is it held in nearly all courts, federal and state, that questions of negligence are for the jury

and not for the court. The rule is incisively stated by the supreme court in Kreigh v. Westinghouse, 214 U. S., 258, quoting from Gardner v. Mich. Cent. Railroad, 150 U. S., 349, 361:

"Questions of negligence do not become questions of law to be decided by the court except where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

It is needless to tabulate the long list of cases in which similar language has been used. The rule just stated is settled law. Equally needless is it to cite ruling cases often cited before in this court—some of them decided by this court—in which facts similar to the facts in the case at bar have been held to justify recovery by the plaintiff. The following new cases are in point on the related questions of assumed risk, negligence of employer and contributory negligence of employe:

"In an employe's action for injuries caused by sacks of cement falling on him from a pile from which shortly before he had taken several sacks, evidence held to make questions for the jury as to the employer's negligence in the manner of piling the sacks and in failing to inspect the pile to determine its safety, as to the employe's contributory negligence, and, if he was negligent, as to whether his negligence was slight in comparison with that of the employer." Bolton-Pratt Co. v. Chester, 210 Fed. 253, (Sixth Circuit.)

"In an action for injuries to a stonecutter, while attempting to cut a stone from a pile, by the fall of the pile, due to inherent weakness in the manner in which it was piled, together with the fact that other stones were leaned against the pile, evidence held to require submission of defendant's negligence and plaintiff's contributory negligence to the jury." Schenkemeyer v. Tusek, 210 Fed. 151. (Third Circuit.)

"In an action for injuries to an employe in a coal mine by the fall of a portion of the roof, evidence held to require submission to the jury of the question whether the firing of shots in certain pillars near where plaintiff was employed caused the roof to become unsafe and fall." Victor-American Fuel Co. v. Peccarich, 209 Fed. 568, (Eighth Circuit.)

"A master is bound to provide safe instrumentalities for his servants while at work, and the servant may absolutely rely on the performance of such duty." Albert Miller & Co. v. Wilkins, 209 Fed. 582, (Seventh Circuit.)

"In actions for negligent injury the questions of the negligence of the defendant and contributory negligence of plaintiff are ordinarily questions for the jury, and courts will not interfere to declare either the one or the other as matter of law, where there is no fixed standard by which the alleged negligence may be determined, or unless there is such an obvious disregard of duty as amounts to misconduct. The question is always one for the jury when the measure of duty is ordinary and reasonable care." Bush v. Hunt, 209 Fed. 164, (Third Circuit.)

The cause of the accident in the case last cited was a defective elevator. Plaintiff knew the elevator worked badly and was also charged with contributory negligence at the time.

Carstens Packing Co. v. Godo, recently decided in

the Ninth circuit, held the alleged negligence a question for the jury. (208 Fed. 8.)

"To establish the defense of assumed risk or of contributory negligence as a matter of law, in an action to recover for the death of an employe of defendant, it must be shown without substantial conflict either that deceased knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it, or that his acts were such that fairminded men could not draw different conclusions therefrom touching the existence of neglect on his part directly contributing to his injury.

"On a motion for directed verdict, the court must take that view of the evidence most favorable to the adverse party." Tennessee Copper Co. v. Gaddy, 207 Fed., 297, (Sixth Circuit.)

In the last case plaintiff was killed by a fall of rock from a higher stope in a mine.

Pacific Telephone & Telegraph Co. v. Starr, 206 Fed. 157, recently decided in the Ninth circuit, plaintiff having been hurt by a defect in a ladder, held the issues of negligence and assumption of risk to be questions for the jury.

"Plaintiff was employed in defendant's store. On the second floor there was a toilet room which she was accustomed to use and which was entered by two steps upward from the floor and through a door. The floor in this room had been taken out in making repairs, but plaintiff had not been notified and did not know it, and as she stepped through the door she fell a distance of ten feet and was injured. The door was not fastened, but there was a large card upon it with a notice that the place was closed for repairs. Plaintiff testified that she did not see the notice; that she was looking down; that the approach was through

a narrow space between two showcases which was also encumbered to some extent by boxes.

"Held that the evidence was not so clear as to warrant the court in directing a verdict on the ground that she was guilty of contributory negligence as a matter of law, but that the question was one for the jury." McLaughlin v. Joseph Horne Co., 206 Fed. 246, (Third Circuit.)

"Where it was customary in a quarry for the foreman to inspect missed shots before reloading them, a laborer directed to reload a missed shot did not assume the risk of injury from an explosion while engaged in his work of reloading, owing to unextinguished fire in the hole." Taylor v. Atchison Gravel Co., 135 P. 576.

To reiterate, plaintiff's injury was caused by an added risk needlessly created by defendant. If plaintiff had been ordered by Green to examine the wall and bar down if necessary the risk would have been an ordinary one, but when Green ordered him to the bottom after time enough had elapsed in his absence for Green to inspect the wall and have it cleared he had a right to assume that the reasonable safety of the wall had been assured by Green, who was charged with that duty according to all the testimony offered on that point.

"It is manifest that a servant cannot be deemed to have been in fault for the reason that he failed to take precaution which he did not know to be necessary for his safety." Labatt, sec. 1233, 2d Ed, citing many cases.

"In determining whether an employe has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies

of his position, indeed to all the circumstances of the particular occasion." Kane v. Northern C. R. Co., 128 U. S. 91.

Labatt's Master and Servant, in Chapter LVI, devoted to the title "Right of action for injuries received in obeying orders," in sec. 1357, lays down the following rule:

"As a condition precedent to establishing his right to recover for an injury on the ground that it resulted from his compliance with a specific and direct order, the servant must establish the following propositions:

(1) That an order was given.

(2) That the order, if not given by the master himself, was given by his representative, within the scope of the authority conferred on him.

(3) That the act which led to the injury was done in obedience to the order.

(4) That the order was a negligent one under the circumstances."

Under this statement the author cites a long list of cases, from which the following are selected as typical:

"A servant does not stand on the same footing as his master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in this respect, and, therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders, without being chargeable with contributory negligence." Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311.

"The servant has a right to rest upon the assurance that there is no danger, which is implied by such

an order." Ill. Steel Co. v. Schymanowski, 162 Ill. 459, 44 N. E. 876.

"Where the personal negligence of the master has directly caused the injury, there the master's liability to the servant is the same as it would be to one not a servant." Whart. Neg. sec. 205.

In such case the fellow servant rule is not a factor.

Further authorities seem superfluous on the question of negligence in this case.

The fifth and seventh contentions of defendant's brief urge contributory negligence and assumption of risk and are fully answered in discussing the second and third. The fourth and sixth urge that the negligence was that of a fellow-servant.

Extended argument on this point is needless because of a statement of the law in defendant's brief with which plaintiff fully agrees, as follows:

"It is not the grade of service but the character of the act to be performed that determines whether a person is a vice principal or a fellow servant." (Brief, p. 66.)

Also quoting from Thompson on Negligence, sec. 4923, (brief 73-4) as follows:

"It must be carefully borne in mind that the comparative grade or rank of the servant inflicting the injury and of the servant receiving the injury is not the controlling test by which to determine whether or not the master is liable, but it is the character of the negligent act or omission; so that when a servant of whatever grade or rank in the service, even the lowest, is charged by the master with the performance of duties in favor of his other servants which the law requires the master to perform, to the end of promoting

their safety, and such servant, while in the performance of those duties, inflicts a negligent injury upon another servant, the master will be answerable in damages for it on the ground that the servant inflicting the injury is his vice-principal, and not a fellow-servant with the one receiving the injury."

Plaintiff might well rest on the foregoing statements of the law, but adds the following from Labatt:

"Whether the employee whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated. His official denomination will not, of itself, determine whether or not he was a representative of the master." Sec. 1434.

"Both on principle and authority it is manifest that a master is no less responsible for the negligence of an employee who is temporarily filling the position of an *alter ego*, than he is for the negligence of an employee who holds that position permanently." Sec. 1435.

It is admitted that Van Campen was superintendent of the mine, and while it is not specifically stated in the record it is clear by necessary inference from numerous statements that on the night shift Green had control of all operations. He was acting superintendent. On page 51 plaintiff says that after dinner in the lunch house:

"We all went back, the whole bunch, and then Mr. Green gave us the orders what we are to do.

"Q. How many were there of you?

"A. I don't know how many there were. I never counted them."

If Green was not vice principal and directing ag-

ent of the corporation when he was in charge of all its work in and out of the mine that was in progress at midnight, then the mine was running itself. It had no principal if it had no vice principal.

Nothing remains to consider but exceptions to instructions of the trial court. It is unnecessary to suggest that defendant waived its motion for a nonsuit by proceeding with the trial and offering testimony. The motions for a directed verdict and for a new trial are covered in discussion of the evidence and the instructions to the jury. While the exceptions to the instructions were numerous they are largely repetitions and only a few are discussed in defendant's brief.

The argument excepts particularly to these instructions, found on page 142-3:

"The duty of providing a safe place to work cannot be shifted by the master, and the agent representing the master in the premises must perform that duty, and if he fails, through negligence, the negligence is that of the master."

"If the employer fails to adopt reasonable precautions to prevent accidents by exercising care corresponding to the hazards of the business, by providing a safe place to work, and safe appliances and tools, he is liable for resulting injuries to employees."

The only criticism that can be made of these instructions is the statements regarding the duty of the master to provide a safe place to work. In the same instructions, however, the court carefully stated the duty to be to take reasonable care to provide a safe

place to work. It is very common for courts to say it is the duty of the master to furnish a safe place to work. It is a harmless inadvertence when qualified by the more accurate statement of the master's duty to exert reasonable care. The opinion of the court in Santa Fe Pacific R. v. Holmes 202 U. S. 438, says as already quoted in this brief:

"The duty of the master to furnish safe places for employes to work in and safe appliances to work with is a continuing one to be exercised wherever circumstances require it."

Kreigh v. Westinghouse, supra; Grand Trunk v. Cummings, supra; and Deserant v. Cerillos Coal R. Co., supra; in the extracts given herein speak of the duty of the master to provide a safe place to work.

The loose statement that the master must furnish a safe place to work is made so often that it is unnecessary to go outside defendant's brief to find instances. On page 51 Citrone v. O'Rourke is quoted, containing the following language:

"The rule of law which makes it incumbent upon an employer to provide or maintain a safe place in which his employees are to do their work."

And in the same extract this quotation from another case:

"The rule that a master must provide a safe place for work only where," etc.

On pages 51-2, in Russell v. Lehigh Valley, the court speaks of "the failure to furnish a safe place for

plaintiff to work in," and "the rule that the master must furnish a reasonably safe place."

On pages 53--4 in Petaja v. Aurora M. Co. similar references are twice made.

On page 67 this language is quoted from Callan v. Bull:

"The rule which requires the master to provide a safe place and safe appliances for the servant."

And on page 54 counsel themselves say: "The Michigan court affirmed the judgment holding the duty of providing a safe place to work," etc.

In Taylor v. Atchison Gravel Co., 135 P. 576, exception was taken to an instruction that:

"The master owes the servant the duty of exercising reasonable care and diligence, and to provide the servant with a reasonably safe place in which to work." The Kansas supreme court held that "the inaccurate statement does not justify a reversal."

In the next paragraph of the opinion (p. 577) the court says:

"A reference was made to the duty of furnishing safe tools. This was unnecessary but not prejudicial. The instructions concerning assumption of risk are criticised. Assuming that they lacked accuracy, we think the verdict cannot have been influenced thereby, in view of the character of the issue of fact."

The instructions of the trial court in the case at bar gave wide latitude to the jury to decide for the defendant. Every phase of the law of negligence applicable to the case was fairly covered. Some very

strong instructons asked by defendant were given. (R. 144-5.) One of these (p. 145) specifically instructed the jury that plaintiff could not recover unless they found from the evidence that the defendant corporation entrusted to Green, the shift boss, the duty of clearing the wall after a shot.

Plaintiff respectfully submits that it is difficult for an unbiased legal mind to say that if the instructions criticised in defendant's brief had been omitted and if nearly all those asked by defendant and refused by the court had been given the verdict would have been different.

On pages 74-5 of defendant's brief instructions excepted to are noted as VI, VIII and IX. These appear in the record as VIII, X and XI, on pages 202-3-4. The objection is based on the argument that these instructions make the chief test of vice-principalship control and authority to direct and command. This is law in jurisdictions where the superior servant rule prevails, and is explained and qualified in other instructions. In IX or XI (R. 204) it is coupled with the statement:

"Any duty which the master is bound to perform for the safety of his servants he cannot escape responsibility for by delegating the performance to a subordinate."

The instructions as a whole made plain to the jury that the plaintiff must recover, if at all, on the negligence of the defendant corporation, which in case of

a corporation must mean its responsible agents. The question of Green's responsibility and authority was as fairly put by the court as the principle is laid down in an authority quoted by defendant's brief on page 71—Judge Sanborn in Weeks v. Scharer, 111 Fed. 330:

"A servant is not, and a master is, liable for the negligence of a fellow-servant while he is engaged in discharging the personal duty of the master to use ordinary care to provide for a reasonably safe place, reasonably safe tools, and reasonably competent servants. An employee frequently acts in a dual capacity—at times a fellow-servant, at times a vice-principal—and the line of demarkation between the negligence whose risk the servant assumes and that for which the master is liable is this: If the act is done in discharge of a positive duty of the master, then negligence therein is the negligence of the latter. If it is done in discharge of any other duty of the employee, it is the negligence of the servant, the risk of which his fellows have assumed."

The substance of the foregoing was given by the trial court, as follows: (R. 205.)

"Certain duties are said to be non-delegable. By this is meant that such duties are personal to the master, and he cannot delegate them to a servant and then escape liability, if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. The rule is that if the duty is one personal to the matter the one to whom he entrusts the performance of this duty is called a vice-principal, and the master is liable for his negligence in relation to such duties."

This is the rule heretofore cited in both these briefs from Thompson on Negligence, sec. 4923.

Counsel for plaintiff (defendant in error) respectfully urge that on the whole record it is shown that the issues were fairly submitted on the law, with no material error, and the jury found the facts under the law against the defendant, plaintiff in error on this appeal.

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